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No. 93-986

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARGARET MCINTYRE,
Petitioner,

v.

OHIO ELECTIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Does Ohio Rev. Code §3599.09(A), an election law disclosure statute designed to prevent fraud and provide the voting public with a limited amount of pertinent information, violate the First and Fourteenth Amendments to the Constitution of the United States?

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STATEMENT OF THE CASE

In 1988, Petitioner Margaret McIntyre opposed passage of a property tax levy for the Westerville, Ohio school district. She prepared, or had prepared, flyers expressing this opposition.

Instead of placing her name and address on these flyers as required by Ohio Rev. Code §3599.09(A) (the "Disclosure Statute"), Petitioner identified those responsible for the flyers as "Concerned Parents and Tax Payers," Joint Appendix ("J.A.") 6-7, a fictitious organization. J.A. 38-39. She distributed these flyers at two separate meetings that were scheduled as open forums for the public to discuss the tax levy. J.A. 14-15.

On each occasion, an assistant school superintendent observed Petitioner distributing the flyers. *Id.* On the first occasion, he cautioned that her failure to include her name and address on them violated Ohio elections law. J.A. 28. Petitioner, however, ignored his cautions. At no time did anyone attempt to prevent her from circulating any literature, nor did anyone seek to prevent her from attending either meeting. Petitioner also was never threatened with any reprisals because of her opposition to the tax levy.

The assistant superintendent eventually filed a complaint with Respondent, the Ohio Elections Commission ("Commission"), alleging that Petitioner had violated the Disclosure Statute, among other provisions of Ohio elections law. J.A. 3, 14-16. At a full hearing conducted by the Commission in a civil enforcement action, evidence was presented that some of Petitioner's flyers did contain the disclosure statement required by Ohio Rev. Code §3599.09(A), and Petitioner testified that she had intended to disclose this same information on all the flyers, though she had failed to do so. J.A. 36-39. It was also revealed that no such organization as "Concerned Parents and Tax Payers" had ever existed. J.A. 38-39. After considering all the evidence, the

Commission found that Petitioner had violated the Disclosure Statute and fined her $100. J.A. 42.

At the hearing and in the Commission's order, the viewpoint contained in the flyers, which expressed Petitioner's anti-levy message, was never considered with respect to any of the issues that were raised and determined. Instead, the sole focus was on whether the flyers included an attribution statement and whether any such statement was false or fraudulent as provided in Ohio Rev. Code §3599.09. *See* J.A. 26-42.

On appeal from this administrative order, an Ohio trial court ruled that Ohio Rev. Code §3599.09(A) was unconstitutional. J.A. 45. A state appeals court upheld the law and reversed. J.A. 49.

Petitioner then took an appeal to the Supreme Court of Ohio, which analyzed her challenge to the Disclosure Statute under the established test for evaluating the constitutionality of election laws crafted in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *See McIntyre v. Ohio Elections Comm'n*, 67 Ohio St.3d 391 (1993), Appendix to Petition for Writ of Certiorari, A1-A15. That test requires a reviewing court to weigh any burden that the challenged legislation places on First Amendment rights against the legitimate interests of the State in regulating the subject matter involved. The Ohio Supreme Court conducted this balancing test and concluded that the Disclosure Statute places only a modest burden on First Amendment rights, which is outweighed by Ohio's proper interests in the deterrence of fraud, misleading advertising, and libel, and in requiring disclosure to the public of specific information that is pertinent to the electoral process. Consequently, the Ohio Supreme Court affirmed the appeals court's holding that the Disclosure Statute is constitutional. Petitioner then sought a writ

of certiorari from this Court, which granted review on February 22, 1994.[1]

SUMMARY OF ARGUMENT

1. The court below properly applied the test established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to analyze the constitutionality of an elections measure such as the Disclosure Statute. Under that test, a reviewing court must weigh any burden the challenged legislation places on First Amendment rights against the legitimate interests of the State in regulating the subject matter involved. Here the Disclosure Statute imposes only a modest burden, if any, on First Amendment rights. This modest burden is substantially outweighed by the State's legitimate interests in the deterrence of fraud, misleading advertising, and libel, and in requiring the disclosure to the public of specific information that is pertinent to the electoral process.

2. *Talley v. California*, 362 U.S. 60 (1960), is inapplicable to this case. *Talley* specifically left for another day whether a measure such as the Disclosure Statute, which is designed to deter fraud, misleading advertising, and libel, is constitutional. In addition, *Talley* did not involve an election law requiring the Court to weigh two competing interests of equal constitutional magnitude -- protecting the right to vote by preserving the integrity of the electoral process and assuring freedom of speech. The States are

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[1] Petitioner died while this case was being briefed in this Court, and Respondent moved to dismiss certiorari under the holding in *American Tobacco Co. v. United States*, 328 U.S. 781, 815 n.11 (1946). On June 13, 1994, the Court granted a motion to substitute parties and denied the motion to dismiss, either rejecting outright or else deferring consideration of the issue whether under these circumstances this case should be correctly understood to be moot. If the Court intended the latter, then Respondent would ask to incorporate by reference the discussion of mootness that was contained in its filings on those motions.

authorized to act to protect the integrity of the electoral process, even when First Amendment rights are implicated, as long as any such action does not discriminate against the viewpoint expressed in any political message.

3. Even if strict scrutiny were to be applied here, however, the Disclosure Statute would withstand such scrutiny because it advances the State's compelling interest in combatting fraud in the electoral process. The Disclosure Statute, moreover, is narrowly drawn to serve that compelling state interest. *Burson v. Freeman*, ___ U.S. ___, 112 S. Ct. 1846 (1992).

4. Disclosure statutes have long been upheld by this Court in many different fields, even where they impose some burden on First Amendment activities. In the field of elections law in particular, the Court's precedents confirm the constitutionality of disclosure statutes in elections both for candidates and for ballot issues. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The same result also holds for disclosure statutes that affect such First Amendment activities as lobbying, *United States v. Harriss*, 347 U.S. 612 (1954), and charitable solicitations, *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S 781 (1988). Any countervailing interest in maintaining secrecy or anonymity is less powerful than Petitioner alleges, and must yield to the State's compelling interests in requiring the disclosure of a limited amount of pertinent information to the public. In this case, for example, any burden allegedly imposed on Petitioner's First Amendment rights by the Disclosure Statute was either minimal or nonexistent, and the State has a compelling interest in requiring the limited disclosures specified in Ohio Rev. Code §3599.09(A).

ARGUMENT

INTRODUCTION

The right to vote is as important to our democratic system of government as any protected by the First Amendment. "Preserving the integrity of the electoral process, preventing corruption, and 'sustaining the active, alert responsibility of the individual citizen in a democracy' ... are interests of the highest importance." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (citation omitted). "To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of those schemes ... inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends," which is justified by "the State's important regulatory interests." *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Ohio has a comprehensive regulatory scheme designed to protect the electoral process by preventing fraud upon the voters and maintaining an educated voting public. The statutes that make up this regulatory scheme operate in concert to promote honesty in the electoral process without interfering with robust debate and the free flow of ideas.

The provision of Ohio's elections laws at issue in this case, Ohio Rev. Code §3599.09(A), is similar to statutes found in many other States.[2] It is a viewpoint-neutral election regulation, *see, e.g.*, *Burson v. Freeman*, ___ U.S. ___, 112 S. Ct 1846, 1859

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[2] These statutes include, for example: Ariz. Rev. Stat. Ann. §§ 19-128, 16-912 (West Supp. 1993) (requiring disclosure and attribution for sponsors of printed campaign materials and campaign broadcast advertising); Mich. Comp. Laws Ann. § 169.247 (West Supp. 1994) (same); Mo. Rev. Stat. § 130.031 (West Supp. 1994) (same); N.H. Rev. Stat. Ann. § 664:14 (Butterworth Supp. 1993) (same); Tenn. Code Ann. § 2-19-120 (Michie Supp. 1993) (same).

(1992) (Scalia, J., concurring), that does not "grant[] to one side of a debatable public question ... a monopoly in expressing its views." *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality opinion, quotation omitted). Ohio Rev. Code §3599.09(A) merely requires the sponsor of mass-produced campaign literature to place his or her name and address on that literature and prohibits the "attribution statement" from being false or fraudulent.

Petitioner argues that the Disclosure Statute violates the First Amendment because it required her to take responsibility for her actions and identify, as her own, campaign literature she produced and circulated with the intention of influencing the outcome of an issue election. The Disclosure Statute, however, does not unconstitutionally burden speech that is protected by the First Amendment. This constitutional challenge to Ohio Rev. Code §3599.09(A) must therefore be rejected.

I. OHIO REV. CODE §3599.09(A) IS A CONSTITUTIONAL ELECTIONS MEASURE BECAUSE IT IMPOSES ONLY A MODEST BURDEN ON FIRST AMENDMENT RIGHTS THAT IS OUTWEIGHED BY THE STATE'S LEGITIMATE INTERESTS IN PREVENTING FRAUD, MISLEADING ADVERTISING, AND LIBEL, AND IN REQUIRING THE DISCLOSURE OF LIMITED INFORMATION THAT IS SIGNIFICANT TO A CITIZEN'S EXERCISE OF THE RIGHT TO VOTE

A. The Proper Test for Analyzing the Constitutionality of an Election Measure Such as Ohio Rev. Code §3599.09(A) Was Established in *Anderson v. Celebrezze*.

"As a practical matter, there must be a substantial regulation of elections if they are going to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). For the most part, this regulation is left to the States. *See Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) ("framers of the constitution intended to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections").

A State's regulation of elections "inevitably affects" and imposes some burden on an individual's constitutional rights. *Anderson*, 460 U.S. at 788. But to subject every election regulation to strict scrutiny and require that every regulation be narrowly tailored to advance a compelling state interest "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, ___ U.S. ___, 112 S. Ct. 2059, 2063 (1992). Consequently, the Court has noted that "[c]onstitutional challenges to specific provisions of a State's election laws ... cannot be resolved by any 'litmus paper test....'"

Anderson, 460 U.S. at 789 (*quoting Storer*, 415 U.S. at 730). Instead, the proper test is this:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State....
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.

Burdick, 112 S. Ct. at 2063 (*quoting Anderson*, 460 U.S. at 789). Petitioner's attack on Ohio Rev. Code §3599.09(A) must be considered within the framework of this test, which the Supreme Court of Ohio properly employed in the decision on review here.

Petitioner, however, contends that the Disclosure Statute has nothing to do with elections because it does not govern any access of candidates to the ballot, but instead concerns the distribution of political leaflets. *See* Brief for Petitioner at 22-29. This contention is plainly incorrect. By its terms, Ohio Rev. Code §3599.09(A) applies only to campaign literature designed "to influence the voters in any election," and only requires that such literature be correctly attributed to its sponsor. *Id*. This provision is just as much an elections measure as the requirement in the very next subsection of the statute that any radio or television advertisement designed "to influence the voters in any election" must identify either the speaker or the financial sponsor of the advertisement. Ohio Rev. Code §3599.09(B). It is also just as much an elections measure as attribution requirements in campaign finance legislation, *see, e.g.*, Ohio Rev. Code §3517.10 (requiring disclosure of names and addresses of political contributors and

itemization of all contributions and expenditures); Ohio Rev. Code §3517.081 (designation of treasurer), or provisions prohibiting the sale or theft of election petitions, *see* Ohio Rev. Code §3599.15, or provisions requiring employers not to seek to influence the political views of their employees through intimidation, Ohio Rev. Code §3599.05. All of these provisions and the Disclosure Statute go to the heart of the manner in which political discourse may be conducted in election campaigns. Thus, *Anderson v. Celebrezze* frames the proper test in assessing the constitutionality of this elections law measure.

B. Ohio Rev. Code §3599.09(A) Imposes Only a Modest Burden, if Any, on First Amendment Rights.

The first issue to resolve under *Anderson* is the impact that the Disclosure Statute has on individuals who seek to exercise their First Amendment rights. On its face, the Disclosure Statute does not require anyone to espouse a position that she does not support or, for that matter, any position at all. *See Burdick*, 112 S.Ct. at 2066. It does not interfere with expression on any topic. Nor does it promote or denigrate any political thought or party.

Nothing in the record indicates that the requirements of the Disclosure Statute substantially inhibit political expression by anyone at all. It certainly did not inhibit Petitioner, who exercised her First Amendment rights to the fullest. In support of this point, the evidence shows that she campaigned vigorously against the school levy without being subjected to any regulation because of the viewpoint expressed in her message. Even in the civil enforcement action at issue here, she was penalized for her failure to make a proper attribution identifying the sponsor of her literature, not for expressing her opinion concerning the tax levy. Indeed, her views on the tax levy were never even presented to the Commission.

Further, there is no evidence in this case to support a conclusion that Petitioner had any interest whatsoever in expressing herself secretly or anonymously, which is the alleged constitutional right she seeks to vindicate before this Court. To the contrary, Petitioner made a point of personally distributing her literature at school board meetings that were heavily attended by other members of the public. She also testified at her hearing before the Commission that she had intended to include her name and address on each handbill, but had somehow failed to do so. Rather than being at all concerned with the prospect that her activities would cause her identity to be divulged, Petitioner left little doubt that she was responsible for producing and circulating the campaign material at issue in this case.

Again, it is significant that Petitioner was never penalized for expressing her views on the levy. Petitioner has speculated that the assistant superintendent's motivation for complaining to the Commission about Petitioner's violation of the Disclosure Statute was his disagreement with her position. Yet this is irrelevant to the issue here, for the constitutionality of the Disclosure Statute cannot be made to turn on the alleged motivations of the person who reports a violation of the law. The charge against Petitioner arose from her conceded failure to comply with the minimal attribution requirements of the Disclosure Statute. She was not fined for expressing her views on the school levy; she was fined for not observing a law that had no bearing on her particular message. Given these facts, she cannot claim that the attribution requirements of the Disclosure Statute imposed any substantial restrictions on the exercise of her First Amendment rights.

C. Any Burden Imposed On First Amendment Rights by Ohio Rev. Code §3599.09(A) Is Substantially Outweighed By the State's Legitimate Interests in the Deterrence of Fraud, Misleading Advertising, and Libel, and in Requiring the Disclosure to the Public of Specific Information that Is Pertinent to the Electoral Process.

The second part of the *Anderson* test requires this Court to evaluate the interests put forward by the State as justifications for the burden imposed by the Disclosure Statute. Ohio's election laws emphasize the deterrence of fraud and corruption and the disclosure of limited information that is important to assuring an educated and informed electorate. The Disclosure Statute stands as an integral part of this regulatory scheme.

The Disclosure Statute performs the important function of identifying the sponsor of printed campaign literature. If it were to be repealed or otherwise invalidated, the effectiveness of two other important provisions of Ohio elections law designed to deter fraud would be undermined. These provisions prohibit persons from making knowingly false statements during the course of candidate elections, *see* Ohio Rev. Code §3599.091(B)(2)-(10), and during the course of issue elections, *see* Ohio Rev. Code §3599.092(B).

In order to commence prosecution for a violation of either statute, a complaint in the form of an affidavit must be filed alleging violations of the provisions. *See* Ohio Rev. Code §§3599.091(C), 3599.092(C). In the absence of any requirement of attribution or disclosure, it often may be difficult, if not impossible, to identify the source of a false statement, particularly if any deliberate effort is made to avoid detection. And without accurate identification of the prevaricator, it is unlikely that anyone will have a sufficient basis to file an affidavit charging such

violations. These provisions of Ohio's election laws, therefore, will consist more of "bark" than "bite."

The Disclosure Statute also ensures that voters receive critical information enabling them to consider the source of campaign statements. *See Bellotti*, 435 U.S. at 791-92 & n.32. Invariably, voters receive a more complete picture when they know the identity of the advocate of a particular position. The disclosure requirement in Ohio Rev. Code §3599.09(A) offers the public the opportunity to evaluate campaign promises and slogans by taking into consideration the advocate's history and reputation for either trustworthiness or bias.

Equally important, the attribution requirements in Ohio Rev. Code §3599.09 ensure that the voting public can be informed about and thus can assess the disproportionate influence that may be exerted by the financial sources backing particular election campaigns. The Disclosure Statute here requires not only that the sponsor of printed campaign materials be identified, Ohio Rev. Code §3599.09(A), but similarly that the sponsor of radio and television advertisements be identified, *see* Ohio Rev. Code §3599.09(B).[3] In some issue campaigns, such as a local option election under state liquor laws, mass circulation of extensive printed materials might be the most efficient manner in which large-scale financial backing makes itself felt. In other issue campaigns, extensively-financed broadcast advertising, which has become a fairly common means of seeking to influence the electorate, may be the preferred vehicle. In either instance,

[3] Petitioner resists any attempt to link the principles at issue in this case with the regulation of "large campaign expenditures." Brief for Petitioner at 28 n.10. Yet the principles that apply to justify attribution of the sponsors of such materials are the very same. Indeed, the Disclosure Statute recognizes this link when it specifies that merely including a generic attribution, such as the "disclaimer 'paid political advertising' is not sufficient to meet the requirements" imposed under the law. Ohio Rev. Code §3599.09(A).

however, it is perfectly sensible for the State to wish to require the sponsor of any such expenditures to be identified, so that the public can evaluate the significance of who is paying for advertising time or for printed materials. Although major financial supporters of one side or another might prefer to keep their identities secret in order to avoid a possible adverse reaction from the public, there is certainly no constitutional right to avoid such public scrutiny; on the contrary, the Court has quoted with approval Justice Brandeis' observation that "Sunlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

To this end, disclosure of the identities of supporters or opponents of a given ballot measure, including its financial supporters or opponents, may be more important in the context of issue elections than in candidate elections. This is because there is no opposing candidate or often no organized group to respond to or refute the allegations made during the course of an issue campaign. The identity of a supporter or opponent may therefore be the most effective barometer, if not the only barometer, available to the public for evaluating the relative worth of a proposed ballot measure. *See Brown v. Superior Court*, 487 P.2d 1224, 1232 (Cal. 1971) ("voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption, and he may gain such knowledge only through pre-election disclosure").

It is precisely for these reasons that the Court has held there can be "no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson*, 460 U.S. at 796. Petitioner has made no showing that her right to freedom of expression was significantly burdened by the attribution requirement contained in the Disclosure Statute, which is the means that the State of Ohio has chosen to foster those "informed and educated expressions of the popular will." *Id.*

"[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions'" upon First and Fourteenth amendment rights, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 112 S. Ct. at 2063-64 (*quoting Anderson*, 460 U.S. at 788). The Disclosure Statute is a reasonable regulation of the electoral process because it helps to deter fraud and to ensure that the electorate has access to pertinent information. Petitioner's attack on Ohio Rev. Code §3599.09(A), therefore, must fail under the test of *Anderson v. Celebrezze*.

D. The Strict Scrutiny Urged by Petitioner Is Inconsistent with *Anderson v. Celebrezze*.

Petitioner contends that because Ohio Rev. Code §3599.09(A) affects speech, not access to the ballot, the Supreme Court of Ohio erred when it did not subject the statute to strict scrutiny. Petitioner, however, misreads this Court's jurisprudence in this area.

It is true that traditionally the Court has applied strict scrutiny to state laws that burden protected speech. Out of respect for the State's interest in election regulation, however, the Court in *Anderson* created a balancing test to weigh this important state interest against the extent of the burden placed on the exercise of First Amendment rights. As a result, strict scrutiny is appropriate only when an election regulation "severely restricts" those rights. *Burdick*, 112 S. Ct. at 2063.

One of the Court's most recent cases illustrates this point. In *Burson v. Freeman*, the Court reviewed a Tennessee statute that prohibited political campaigning within 100 feet of the polls on election day. 112 S. Ct. at 1848. This statute effectively prohibited political speech in its entirety on the most politically important day of the year at locations ideally situated to offer

speakers maximum exposure to the relevant community of listeners, those people who actually intend to vote. Because this statute represented a severe restriction on speech, the Court subjected the Tennessee statute to strict scrutiny, but upheld it despite the severity of this restriction. *See id.* at 1850-58.

Unlike the state law at issue in *Burson*, Ohio Rev. Code §3599.09(A) does not prohibit political speech at any time or place. On the contrary, it merely requires the disclosure of a limited amount of information by requiring attribution of the sponsor of printed materials, thereby increasing the amount of information available to voters. The statute in *Burson* thus restricted First Amendment rights far more severely than does the Disclosure Statute. Consequently, *Anderson*, not *Burson*, states the applicable standard of review.

Anderson dictates that the Disclosure Statute need not satisfy as stringent a test, but rather requires application of the balancing test set forth above. That test, once again, takes into account the nature of the First Amendment right affected and the degree to which that right is affected, as well as the importance of the state purposes that underlie the restriction. Viewed in this light, the important state interests promoted by Ohio Rev. Code §3599.09(A) justify the modest burden it places on First Amendment rights. A standard of review that involves strict scrutiny is not applicable here.

II. THE DECISION IN *TALLEY v. CALIFORNIA* IS INAPPLICABLE TO ELECTION MEASURES SUCH AS OHIO REV. CODE §3599.09(A)

The Supreme Court of Ohio applied the *Anderson* test to Ohio Rev. Code §3599.09(A) and determined that the statute passed constitutional muster. As part of its decision, the lower court correctly distinguished *Talley v. California*, 362 U.S. 60

(1960), which, according to Petitioner, provides the chief basis for her claim that the Disclosure Statute violates the First Amendment.

In *Talley*, a case that did *not* address an election measure, the Court struck down a "broad" municipal ordinance that barred "distribution of any [anonymous] hand-bill in any place under any circumstances" within the boundaries of the municipality. 362 U.S. at 63. Significantly, the broad prohibition that was invalidated in *Talley* was neither designed nor applied to deter fraud, misleading advertising, or libel, as the Court emphatically observed. 362 U.S. at 64. Therefore, the Court in *Talley* expressly left for another day the issue whether a more narrowly drawn statute designed to deter fraud, misleading advertising, and libel is sufficient justification for placing a more modest burden on speech. *Id.*

In this case, the Ohio Supreme Court determined that "[i]n contrast to the ordinance at issue in *Talley*, [the Commission] can legitimately claim that [Ohio Rev. Code §3599.09] has as its purpose the identification of persons who distribute materials containing false statements. Accordingly, unlike *Talley*, the disclosure requirement is clearly meant to 'identify those responsible for fraud, false advertising and libel.'" *McIntyre*, 67 Ohio St.3d at 394 (*quoting Talley*, 362 U.S. at 64). Thus, unlike the ordinance in *Talley*, Ohio Rev. Code §3599.09(A) has been given a narrowing construction that is consistent with constitutional demands.

The *Talley* Court also did not address the validity of a state statute requiring attribution of the sponsor of printed materials for the limited purpose of making critical information available to the voting public during an election campaign. As a result, the Court in *Talley* was under no necessity to balance important but competing constitutional interests.

In this case, by contrast, two constitutional interests of the highest order -- protecting the right to vote and safeguarding

freedom of speech -- are involved. It has been noted that "there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson*, 112 S. Ct. at 1859 (Kennedy, J., concurring). That narrow area must include a law designed to "protect the integrity of" elections because "[v]oting is one of the most fundamental and cherished liberties in our democratic system of government." *Id.* Where, as here, "[t]he State is not using this justification to suppress legitimate expression," *id.*, protecting the integrity of the electoral process takes priority over any interest in secretly engaging in political activity without attribution or disclosure to the public.

III. EVEN IF A STRICT SCRUTINY ANALYSIS WERE APPLIED IN THIS CASE, OHIO REV. CODE §3599.09(A) IS CONSTITUTIONAL BECAUSE IT IS NARROWLY DRAWN TO SERVE THE COMPELLING STATE INTEREST OF COMBATTING FRAUD IN THE ELECTORAL PROCESS

The foregoing discussion explains why this Court should apply the *Anderson* balancing test, which was designed specifically to test the constitutionality of election regulations, in assessing Ohio Rev. Code §3599.09(A). Nevertheless, if this Court chooses to subject Ohio Rev. Code §3599.09(A) to strict scrutiny, the Disclosure Statute still passes constitutional muster.

When the Court reviews a state statute under the strict scrutiny standard, it must determine whether the statute serves a compelling state interest and whether the statute is narrowly drawn to serve that interest. *Burson*, 112 S. Ct. at 1851. According to the Ohio Supreme Court's definitive construction, one purpose of the Disclosure Statute is to protect the integrity and reliability of the electoral process by preventing fraud. *McIntyre*, 67 Ohio St.3d at 394. "[A] State has a compelling interest in ensuring that an

individual's right to vote is not undermined by fraud in the election process." *Burson*, 112 S. Ct. at 1852. Thus, as long as the Disclosure Statute is narrowly drawn to serve that compelling state interest, the Disclosure Statute withstands strict scrutiny.

As described in Section I.C, *supra*, Ohio Rev. Code §3599.09(A) operates in conjunction with provisions that are designed to penalize persons for making knowingly false statements with intent to influence the outcome of an election.[4] These statutory provisions legitimately prohibit speech that is constitutionally unprotected. Yet it would do little good to have laws that penalize the making of intentionally false statements if their effectiveness is undermined, or even destroyed, because the State is not permitted to employ reasonable means to identify the source of any such unprotected statements. The attribution requirement contained in the Disclosure Statute is not only the most effective way, but is the only practical way, for the State to identify those who violate the law in this manner.

Petitioner's arguments that the Disclosure Statute is not narrowly drawn to prevent fraud are flawed. It is specious to suggest that Ohio Rev. Code §3599.09(A) could be drawn to require only false and fraudulent statements to contain the attribution, *see* Brief for Petitioner at 9, as prevaricators cannot be expected to point a beacon at their own lies. Accordingly, the attribution requirement contained in the Disclosure Statute, and those contained in similar statutes, must have general application.

Petitioner also suggests that Ohio Rev. Code §3599.09(A) could be more narrowly drawn to apply only to candidate elections. Brief for Petitioner at 33. A provision drawn in that way, however, would be inadequate for at least three reasons.

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[4] For purposes of Ohio law, "knowingly false" statements include only those statements that, consistent with the standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964), fall outside the protection of the First Amendment.

First, the suggested revision presumes that the sole purpose of statutes like Ohio Rev. Code §3599.09 is to prevent libel and to protect the integrity of individuals. In making this suggestion, Petitioner appears to concede that the State is justified in requiring attribution in candidate campaigns, so that the State may hold accountable any persons who would knowingly spread lies about a candidate for office. But issue campaigns are not immune to the evils of personal slurs and the deliberate smearing of personal reputations. In a ballot issue election, individuals may be closely identified with one side or the other, and the target of a smear campaign may be a private citizen rather than a seasoned elected official. It is thus incorrect to suggest, as does one of Petitioner's authorities, that the only purpose for an attribution statement is to identify the person behind an "eleventh-hour smear campaign" against a candidate for office. *Illinois v. White*, 506 N.E.2d 1284, 1288 (Ill. 1987).

Second, the Disclosure Statute is designed to protect society and the integrity of the electoral process against fraud as well as libel. Petitioner either ignores or underestimates the harm done when a lie is responsible not for the success or failure of a candidate, but for the passage or defeat of a constitutional amendment, a referendum, a local tax levy, or any other ballot measure. In either case, society suffers because the democratic process is subverted; in either case, the State has legitimate and indeed compelling interests to protect.

Third, nothing in Petitioner's arguments would provide any principled basis for distinguishing the State's interest in protecting individuals against libel from the State's interest in preventing fraud in election campaigns. The latter interest is at least as compelling, as this Court has held. *See, e.g., Burson*, 112 S. Ct. at 1852. Petitioner understandably seeks a favorable decision here by suggesting that the permissible grounds of state regulation should stop anywhere short of the facts of this case, but there is no reason to conclude that these suggestions are at all defensible as a matter of constitutional doctrine.

Petitioner further argues that the existence of other statutes that also address the problem of fraud makes the Disclosure Statute unnecessary. Brief for Petitioner at 37-39. Ohio Rev. Code §3599.09 is not rendered unconstitutional, however, merely because other statutes may directly or indirectly address the same important problem. If that were the standard, then the existence of bribery laws would have been sufficient to render campaign disclosure statutes unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See Burson*, 112 S. Ct. at 1855 (citing *Buckley*, 424 U.S. at 28, for the proposition that the "existence of bribery statutes does not preclude need for limits on contributions to political campaigns"). Certainly, Ohio may use more than one weapon to combat the same evil, especially when one weapon alone might prove ineffective in deterring impermissible behavior.

The Court's analysis in *Buckley* reflects this point. In that case, the Court upheld a federal law that required the disclosure of contributions and expenditures during political campaigns, noting that the compelling state interests served by disclosure were that it "deter[s] actual corruption ... by exposing large contributions and expenditures to the light of publicity" and is "essential ... to detecting violations of the contribution limitations." *Buckley*, 424 U.S. at 67-68. The campaign finance disclosure provisions did not in and of themselves prohibit political corruption or prevent anyone from making illegal contributions. Instead, they made it more difficult for corruption or illegal contributions to occur without detection.

In much the same way, Ohio Rev. Code §3599.09(A) deters fraud without actually punishing it. By requiring campaign literature to disclose the name of its sponsor, the Disclosure Statute increases the likelihood that parties will be held responsible for complying with the laws, and thus makes it more likely that the speaker or other responsible party will take care to ensure that his statements are accurate rather than simply disseminating libels or outright lies.

Without the attribution provisions of Ohio Rev. Code §3599.09, important complementary provisions of the law will be more easily evaded. As a result, Ohio's efforts to prevent fraud in the electoral process, which advance a compelling state interest, can only falter if the Disclosure Statute is invalidated. Ohio Rev. Code §3599.09(A) should therefore be upheld, even under a strict scrutiny analysis, as a constitutionally appropriate mechanism for preventing fraud in the election process.

IV. OHIO REV. CODE §3599.09(A), LIKE OTHER DISCLOSURE STATUTES, IS CONSTITUTIONAL BECAUSE ANY ASSERTED INTEREST IN SECRECY OR ANONYMITY MUST YIELD TO THE STATE'S COMPELLING INTEREST IN REQUIRING DISCLOSURE TO THE PUBLIC OF A LIMITED AMOUNT OF PERTINENT INFORMATION

A. The Court's Precedents Confirm that Disclosure Statutes Are Constitutional in Elections for Candidates and for Ballot Issues.

The Court's decisions demonstrate that disclosure statutes are constitutionally valid both in candidate elections and in ballot elections. In *Buckley*, for example, the Court confronted a challenge to the constitutionality of the Federal Election Campaign Act. This legislation "impose[d] reporting obligations on political committees and candidates" that would require disclosure of contribution lists, 424 U.S. at 62, and require "direct disclosure of what an individual or group contributes or spends." *Id.* at 75.

The *Buckley* Court identified three compelling state interests vindicated by these disclosure requirements, among them "provid[ing] the electorate with information ... as to where

political campaign money comes from and how it is spent by the candidate ... in order to aid the voters in evaluating those who seek federal office." *Id*. at 66-67 (footnote and internal quotes omitted). Recognizing the "informational interest" served by disclosure, the Court characterized the reporting requirement for individuals as a "reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our ... election system to public view." *Id*. at 81-82 (footnote omitted).

The Court was pressed to establish a blanket exemption from disclosure for minor political parties, which rarely elect candidates, and their members, who, if their identities were disclosed, might be subject to reprisal for their unorthodox views. But the Court rejected any blanket exemption, noting that

> [t]here could well be a case, similar to ... *NAACP v. Alabama* and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied. But no appellant in this case has tendered record evidence of the sort proffered in *NAAC Pv. Alabama*. Instead, appellants primarily rely on "the clearly articulated fears of individuals" .... On this record, the substantial public interest in disclosure ... outweighs the harm generally alleged.

Buckley, 424 U.S. at 71-72 (footnotes and citations omitted); *see also id*. at 69-70 (distinguishing *NAACP v. Alabama*, 357 U.S. 214 (1966), where the organization had made an uncontroverted showing that on past occasions revelation of the identity of its members had exposed them to economic reprisal, threats of physical coercion, and other manifestations of public hostility).

Both the statutory provisions upheld in *Buckley* and Ohio Rev. Code §3599.09(A) require disclosure during election

campaigns of information that implicates the First Amendment. Both laws have as a major goal the assurance that the public has access to pertinent information about the sponsorship of political campaigns. Thus, although *Buckley* addressed the constitutionality of campaign finance disclosure laws, it provides a workable and appropriate framework for evaluating whether the Disclosure Statute is constitutional.

The general rule to be gleaned from *Buckley* is that the voting public has a compelling interest in having certain information made available to help it decide the important issues of the day and, accordingly, the States and the Federal government are authorized to require disclosure of such limited information in a way that does not significantly encroach on First Amendment rights. The Court's treatment in *Buckley* of its earlier decision in *Talley* underscores the point that the *Buckley* approach is properly applicable to election disclosure laws such as Ohio Rev. Code §3599.09(A).

In the course of rejecting the contention that *Talley* barred the application of campaign finance disclosure laws to individuals, the Court stated in *Buckley*:

> The ordinance found wanting in *Talley* forbade all distribution of handbills that did not contain the name of the printer, author, or manufacturer, and the name of the distributor. [Respondent] urged that the ordinance was aimed at identifying those responsible for fraud, false advertising, and libel, but the Court found that it was "in no manner so limited." 362 U.S., at 64. Here, as we have seen, the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced.

Buckley, 424 U.S. at 82 (*quoting Talley*, 362 U.S. at 64). The Court in *Buckley* did not distinguish *Talley* on the ground that *Talley* involved the distribution of handbills or literature or on the ground that it involved the asserted state interests of preventing fraud, misleading advertising, and libel. Instead, the Court found *Talley* inapposite because in that case there was no "substantial connection" between "the information sought" and the "governmental interests ... to be advanced." *Buckley*, 424 U.S. at 81.

In the case at bar there plainly is a "substantial connection" between the need for disclosure and the State's interest in assuring that a limited amount of pertinent information about the sponsorship of political advertisements is made available to inform the voting public. As this Court recently observed, "the identity of the speaker is an important component of many attempts to persuade." *City of Ladue v. Gilleo*, 62 U.S.L.W. 4477, 4481 (U.S. June 13, 1994). Ohio Rev. Code §3599.09(A) does nothing more than assure that such limited information is disclosed in order to permit a more informed electorate to make rational decisions about the candidates and issues of the day.

Although *Buckley* specifically addressed the justifications for disclosure in candidate elections, the value of an informed voting public is equally compelling in the context of issue elections, for the results of either kind of election can have serious ramifications for the citizenry for years to come. For example, an uninformed or misinformed vote cast in a candidate election may result in the election of a less deserving candidate, which might indirectly affect the shaping of public policy on particular issues. But an uninformed or misinformed vote cast against a school board levy, as in this case, can also shape public policy by affecting not only the quality of children's education but also the level of taxation of real property.

Thus, disclosure is as necessary in issue elections as in candidate elections. Although there is no candidate for office who

can be corrupted, the process for determining ballot issues can be severely skewed in the direction of one side or the other, perhaps through particular groups exerting their influence by sponsoring mass distribution of printed materials or an extensively-financed media campaign. Further, the subject matter of the ballot issue may be complex and not lend itself to easy analysis. The supporters or opponents of a ballot issue, because they have a special interest in and knowledge of the subject, may be able and willing to devote great amounts of time or money to promoting the position they favor. The public may have little or no idea who or what is the driving force for or against the passage of a particular ballot issue. Thus, the disclosure of the identity of those whose distribution of printed materials or sponsorship of media advertising makes them principal supporters or opponents may send a clarion call to the public that closer attention is warranted.

The concept that disclosure of the supporters of a ballot issue is constitutionally permissible has been approved by the Court. In *Bellotti*, the Court examined a state statute that prohibited corporations from making contributions or expenditures "for the purpose of ... influencing or affecting" the outcome of a ballot issue. 435 U.S. at 768 (*quoting* Mass. Gen. Laws Ann., Ch. 55, §8 (West Supp. 1977)). In one part of its holding, the Court invalidated this prohibition, finding that neither the "First or Fourteenth Amendment, or the decisions of this Court, [support] the proposition that speech that otherwise would be [protected by] ... the First Amendment loses that protection simply because its source is a corporation." 435 U.S. at 784.

Although the Court held that a State could not prohibit corporate contributions and expenditures, the Court recognized that the people should be permitted, in connection with an issue election, to "consider, in making their judgment, the source and credibility of the advocate." *Bellotti*, 435 U.S. at 791-92. To that end, the Court specifically observed that attribution statements identifying the source of advertising may be required by statutory disclosure provisions:

> Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. *See Buckley*, 424 U.S. at 66-67.... In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed. 424 U.S. at 67.

Bellotti, 435 U.S. at 791 n.32. Although *Bellotti* specifically involved the First Amendment rights of corporations, nothing in the Court's footnote 32 limits its scope to the disclosure of the identities of *corporate* sponsors of campaign literature. To the contrary, the Court's reliance on *Buckley*, in which the Court expressly permitted the disclosure of the identities of individuals, suggests that disclosure of the "source of the advertisement" serves an important state interest regardless of whether that source is a corporation, an association, a partnership, a civic group, or an individual.[5]

Moreover, the application of such attribution requirements to individuals or individual groups in ballot issue elections makes sense. Although corporations have great financial resources, community activists and community organizations may exert significant influence over the outcome of ballot issue elections, including such purely local issues as liquor option elections or tax levies on real property. The association of such persons or groups with one side or the other of a ballot issue, or their financial sponsorship of one side or the other, is important information to the electorate, just as personal or group endorsements of candidates

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[5] Petitioner's attempt to distinguish *Bellotti* by contending that it involved advertising by corporations, Brief for Petitioner at 32-33, is thus misplaced. Nothing in the principles at issue here would support such a distinction, and the combination of *Bellotti* and *Buckley* shows it to be unfounded. Thus, Petitioner is ultimately forced to disparage this passage from the Court's footnote 32 in *Bellotti* as "tentative." *Id.*

provides important information to voters when they are choosing elected officials.

It may be conceivable that someone, under certain peculiar circumstances, could decide to remain silent rather than speak because disclosure statutes such as this one do not permit him to cloak his speech with the secrecy of anonymity. Indeed, in *Buckley*, the Court expressly observed that "[i]t is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute." 424 U.S. at 68. Nonetheless, the *Buckley* Court went on to conclude that the strong public interest in disclosure outweighed any potential harm to unidentified individuals. There is no good reason here to depart from that conclusion.

In this case, Petitioner's identity and her association with the opposition to the school levy could well have been important information for the public. Her history as an opponent to school levies appears to have been well known in her community, and the public was entitled to know the source of the literature they reviewed in evaluating it for possible bias.

B. Disclosure Statutes in Other Areas of the Law Have Been Upheld Even When They Impose Burdens on First Amendment Activities.

The validity of disclosure statutes has also been upheld by the Court in other areas outside the field of elections law. In such decisions, the Court has applied the same principle that the States and the Federal government may reasonably require the disclosure of limited amounts of information, particularly where the information discloses the sources of statements and of any financial sponsorship that lies behind them, even though the required disclosures may impose some incidental burdens on First Amendment activities.

In *United States v. Harriss*, 347 U.S. 612 (1954), for example, the Court upheld the constitutionality of disclosure requirements for lobbyists. In arriving at this holding, the Court began by noting that a mere disclosure requirement imposes only a modest burden on First Amendment rights, seeking not to prohibit any speech but rather simply to require "a modicum of information" from those who engage in lobbying to influence legislation. *Id.* at 625. This modest burden was readily justified by the legitimate state interest in "maintain[ing] the integrity of a basic governmental process." *Id.* In discussing this interest, the Court recognized that disclosure requirements serve the purposes of deterring fraud and assuring that pertinent information is made available to political actors who can make use of it. Without such disclosure laws, "the voice of the people may all too easily be drowned out by the voice of the special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* The same concerns, once again, may very well arise in the course of an election campaign over a proposed ballot measure.

As in *Buckley*, moreover, the Court acknowledged in *Harriss* that reporting requirements "may as a practical matter act as a deterrent to [a lobbyist's] exercise of First Amendment rights," in particular the right of free speech and the right to petition the government for the redress of grievances. 347 U.S. at 626. It nonetheless concluded, again as in *Buckley*, that the prospect of "such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." *Id. See also Bellotti*, 435 U.S. at 792 n.32 (citing both *Buckley* and *Harriss* as support for the conclusion that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected").

The Court has reached the same conclusion in assessing disclosure requirements in the area of charitable solicitations. In

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988), the Court invalidated numerous provisions of North Carolina's charitable solicitations laws, but took care to caution that "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status." *Id.* at 799 n.11. The lower courts have followed this admonition and, though invalidating some of the more extensive disclosure requirements, have consistently upheld state laws that require a charitable solicitor to disclose her name and the name of any entity for which she is acting as an agent. *See, e.g., American Ass'n of State Troopers, Inc. v. Preate*, 825 F. Supp. 1228, 1233 (M.D. Pa. 1993); *Indiana Firemen's Ass'n, Inc. v. Pearson*, 700 F. Supp. 421, 425 (S.D. Ind. 1988).[6]

Ohio Rev. Code §3599.09(A) is likewise a disclosure statute, but in the context of the right to vote, and therefore the same justifications relied on to uphold other kinds of disclosure provisions apply with even greater force here. The possibility that someone could be discouraged from speaking by nothing more than a modest disclosure requirement should not take precedence over the substantial, indeed compelling, state interests the Court has recognized are furthered by the enforcement of such provisions. In circumstances where the disclosure of a limited amount of pertinent information to the public is demonstrably justified, disclosure provisions like Ohio Rev. Code §3599.09(A) are constitutionally valid.

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[6] In corporate proxy campaigns, Congress has also required extensive disclosures "to promote the free exercise of the voting rights of stockholders by ensuring that proxies would be solicited with explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (construing 15 U.S.C. §78n(a)) (internal quotes omitted).

C. American Historical Tradition Does Not Support Petitioner's Contention that There Is an Absolute Right to Engage in Anonymous or Secret Political Activity.

Any right to engage in political activity in secret or without attribution, if any such right exists at all, surely is not absolute. The Court's decision in *Buckley*, still the landmark decision concerning campaign finance disclosure, makes it clear that the States and the Federal government, in order to enhance the electoral process, may require individuals and groups to disclose certain types of limited information. And *Buckley* stands for the proposition that this is so even when individuals and groups are engaging in political activities and political speech located at the very core of First Amendment freedoms.

Petitioner appears to suggest that because some of the Framers published anonymous writings during the Revolutionary period, and other public figures have done so since, the First Amendment must be understood to prohibit *any* government restrictions on those who wish to engage in political activity in secrecy or without attribution. Brief for Petitioner at 12-15. The publication of anonymous and pseudonymous books and essays has indeed played an important role in American history. Yet this general observation is insufficient to control the specific disclosure issues raised in this case. Moreover, by citing a few historical examples to buttress her argument, Petitioner ignores two critical points that place such publications in their appropriate historical context.

First, even in the American colonial era, the practice of anonymous publication was controversial because many believed that it did not give readers sufficient information to evaluate the context of such publications. Although the use of pseudonyms was commonplace during the debate that preceded ratification of the Constitution, it became a "hotly contested" issue, as "Federalist

and Anti-Federalist editors debated the continuing necessity of this practice and its practical impact on the character of public debate over ratification." Saul Cornell, *The Other Founders: Anti-Federalism and the American Constitutional Tradition* (forthcoming 1995) (manuscript at 169, on file with author and The Institutute of Early American History and Culture, Williamsburg, Virginia). In fact, "[w]hile the most famous series of Federalists essays were published under the pseudonym of Publius, many Federalists began to rethink the continuing desirability of the policy of anonymous publication." *Id.* at 171.

The chief concern raised by anonymous or secret publication was whether the author would be able to conceal his true motives when attempting to influence public opinion:

> We cannot but have domestic and foreign enemies, who would most cordially rejoice at our misfortunes: Indeed it would be for the interest of the other nations, to keep us in our divided and distracted condition. The emissaries of these, by anonymous productions, will probably fill the press with objections against the report of the Convention. But as every American has a right to his own sentiments on the subject, so he must have liberty to publish them. The press ought to be free. Yet he cannot be a friend to his country, who upon a production on the subject, will conceal his name. Therefore, it is submitted to you, gentlemen, and the other Printers in the State, whether it will be best to publish any production, where the author chooses to remain concealed.

Editors, Boston Independent Chronicle, Oct. 4, 1787 (*reprinted in* XIII *The Documentary History of the Ratification of the Constitution* 315 (John P. Kaminski and Gaspare J. Saladino eds., 1981).

Less than a week later, newspapers began to heed this advice. For example, the Massachusetts Centinel required that all writers must be "willing his name should be handed to the publick" in case his writings "have an influence to deceive some, who supposing them to be the result of an honest enquiry of some friend to our country, may give them attention." Editors, Massachusetts Centinel, October 10, 1787 (*reprinted in* XIII *The Documentary History, supra*, at 315-16).

Thus, contrary to Petitioner's suggestion that secrecy or anonymity reflects a sacred and untouchable American tradition, the practice of anonymous-publication without attribution was controversial even for those, like the Federalists, who used it to their advantage. And it was controversial for the very reason that the State here relies on to justify the modest disclosure requirements contained in Ohio Rev. Code §3599.09(A): disclosure of the identity of the writer helps the public to appraise the source and evaluate the value and sincerity of the message. A more narrow application of this general principle -- that the sponsorship of printed material and broadcast advertising should be disclosed to the public to permit more informed decisionmaking -- underlies the enactment of federal and state laws such as the Disclosure Statute.

Second, with the ratification of the Constitution and the subsequent passage and application of the Bill of Rights, many of the most serious concerns that led the colonial patriots to act in secrecy were eventually dissipated or eliminated. Perhaps the most important of those concerns was the threat of punishment for seditious libel, which could fall upon any individual who engaged in speech critical of the government. Colonial printers were well aware of the reality of criminal and other legal restraints on their expression. Norman L. Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* 44 (1986). Once American patriots began to actively resist British policies, they recognized their own personal stake in expressing anti-British opinions:

> Anonymously arguing ... in the *New-York Gazette*, William Smith underscored the obvious: if British officials could actually enforce Orthodox Whig theories of seditious libel, then "all our Vindications since the Year 1765 are seditious and libelous, if not of a Treasonable Complexion. What if a Door should be opened, to be revenged of the Patriots who have wrote and printed in our Favour?"

Id. at 51 (*quoting* the New York Gazette, Mar. 19, 1770).

The danger of seditious libel suits did not end at once with victory in the Revolutionary War. Even after the founding of this new nation, many people, especially the Anti-Federalists, feared the inauguration of national libel prosecutions. *Id.* at 69. These fears led directly to the adoption of the First Amendment. *Id.* at 70. Ratification of the First Amendment, however, did not immediately stem the tide of seditious libel suits. In fact, these suits increased: "Development of national political factions and partisan newspapers during the 1790s provided the background for fierce debates over the proper limits on political speech and for more frequent use of political libel prosecutions." *Id.* at 71. The increased use of political libel suits reflected "a growing desire among some people, especially those of 'the Federalist persuasion,' to substitute libel laws for rhetorical denunciations of licentious publications." *Id.* at 75-76. Fear of widespread political criticism drove the Federalists to pass the Sedition Act of 1798. *Id.* at 259. Only in the aftermath of this discredited measure did the threat posed by such laws finally recede.

The threat of seditious libel suits no longer exists under the Court's jurisprudence interpreting and applying the First Amendment. As the Court observed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276 (footnote omitted). Both the President and the Congress eventually recognized the

unconstitutionality of such laws, and the "invalidity of the Act has also been assumed by Justices of this Court .... These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id*. Thus, the principal concern that led many early Americans to publish political tracts critical of the government in secret is not present today.

In this case, for example, by enactment of the Disclosure Statute, the Ohio General Assembly is not threatening to resurrect actions to punish seditious libel or to regulate political expression in general. The measure does not purport to bar all anonymous speech, whether engaged in for political purposes or otherwise, nor could it legitimately do so. Instead, it simply requires the disclosure of a limited amount of information to the public, in order to advance what the Court has recognized as compelling interests in the area of election regulation. For these reasons, the Disclosure Statute does not run afoul of any unconditional or absolute interest in engaging in political activity in secret or without attribution.

Petitioner's sweeping argument -- that anonymous speech, undertaken in secrecy and without public attribution, transcends any constitutional regulation whatsoever by the State -- is unsupported either by the decisions of the Court described previously, *see* Sections IV.A & IV.B, *supra*, or by the actual history of this country under the provisions of our Constitution. This case is not about the general issue of whether books and essays can be published under a pseudonym. Instead, the specific issue in this case is whether a narrowly focused disclosure requirement enacted as part of a comprehensive state "election code[]," *see Anderson*, 460 U.S. at 788, is justified by the State's acknowledged interests in preventing fraud and assuring that the public will have access to a limited amount of pertinent information. In this context, Ohio Rev. Code §3599.09(A) is constitutional.

D. Taken Together, the Decisions in *Burson v. Freeman*, *First National Bank of Boston v. Bellotti*, and *Buckley v. Valeo* Demonstrate that Ohio Rev. Code §3599.09(A) Is a Constitutional Disclosure Statute.

Ultimately, this Court need look no further than *Burson*, *Bellotti*, and *Buckley* to resolve this controversy. All three cases reflect the appropriate deference the Court extends to election regulations in order to preserve the States' authority to safeguard the integrity of the electoral process.

Once again, the Tennessee statute challenged in *Burson* was a content-based restriction on political speech. In its actual application, the law prohibited any political dialogue between advocates and voters on election day within 100 feet of the polls, which is undoubtedly the most compelling meeting place for those engaged in participatory democracy. The Court "has recognized that 'the First Amendment has its fullest and most urgent application to'" this type of speech. *Burson*, 112 S. Ct. at 1850 (*quoting Eu v. San Francisco Democratic Committee*, 489 U.S. 214, 223 (1989)) (internal quotes omitted). Nevertheless, the Court upheld that measure, concluding that the State's compelling interest in preventing fraud suffices to justify even a blanket ban on political speech.

In comparison, any burden on speech resulting from the application of the Disclosure Statute is modest. Unlike the law challenged in *Burson*, political speech is not prohibited under Ohio Rev. Code §3599.09(A). The statute only requires disclosure of a limited amount of pertinent information to the public to help prevent fraud and preserve the integrity of the electoral process. Moreover, there is no suggestion that the prescriptions of the Disclosure Statute favor one political message over another.

Bellotti stands for the proposition that disclosure of the identity of a sponsor of campaign literature distributed during an issue campaign is constitutional. The influence that an individual or corporation may have on the outcome of an issue election is not necessarily gauged by the amount of money spent. Influence in an election can be measured in different ways, especially in campaigns involving purely local issues, such as liquor option elections and local property tax issues. The identity of an active sponsor of mass-produced printed materials or media advertising can have just as much influence on the results of a local election as the identity of a corporate speaker. There is no justification for suggesting that they must be treated differently as a matter of constitutional law.

Finally, the Court's decision in *Buckley* resolves several issues raised by Petitioner. *Buckley* upheld the constitutionality of campaign finance reporting laws even when they required disclosure of the identities of members of minor parties or unpopular organizations. In this case, the Court must determine whether the Disclosure Statute encroaches upon First Amendment rights to a greater degree than campaign finance disclosure laws.

The gist of Petitioner's argument is that even the most active proponents and opponents of a ballot issue -- persons who are interested enough in influencing the outcome of an election to sponsor mass-produced campaign literature -- are entitled to do so secretly or anonymously. Yet *Buckley* squarely held that members of unpopular organizations and minor political parties, who may do nothing more than pay dues or make small donations in support of a candidate, are not entitled to do so secretly or anonymously. No one can seriously argue that opposition to a local tax levy exposes an individual to greater peril or ostracism than does membership in an unpopular organization or minor political party. Indeed, the latter presents far greater peril of persecution if an individual's identity is exposed, for unpopular organizations or minor political parties can be perceived as threats to accepted

community standards or beliefs, whereas opposition to a local tax levy often is predicated exclusively on economic concerns.

Nonetheless, the only exception to campaign finance disclosure laws that the *Buckley* Court carved out under the First Amendment was for members of organizations who could demonstrate that the disclosure of their identities likely would result in specific injuries. Even if such an exception to the Disclosure Statute were appropriate here, however, Petitioner has failed, based on the record, to demonstrate any concrete injury that resulted from disclosure of her identity during the school levy campaign. Her only allegations in this regard, *see* Brief for Petitioner at 19, are unsubstantiated, and any such vague perception of potential harm is a far cry from the degree of injury demanded by the Court in *Buckley*.[7] Moreover, Petitioner could not realistically fear that placing her name on the flyers, thereby associating herself with opposition to the proposed school levy, would lead to retaliation, for she already was well known as an outspoken critic of the levy. Indeed, in addition to placing her name on many copies of the flyer at issue, she testified that she had intended to place her name on all of them. J.A. 36-39.

Because Petitioner could not show that she was uniquely harmed by the disclosure of her identity, her alleged interest in engaging in political activity secretly or anonymously must yield to the requirements of the Disclosure Statute, which provide a "reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our ...

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[7] *Brown v. Socialist Workers' Party*, 459 U.S. 87 (1982), is a good example of the circumstances in which the Court has deviated from the general proposition that blanket exceptions to campaign disclosure laws are unwarranted. In *Brown*, the respondents provided the type of concrete evidence of injury -- FBI surveillance of party members, destruction of property, and police harassment -- that the *Buckley* Court considered necessary to avoid disclosure. *Id.* at 99.

election system to public view." *Buckley*, 424 U.S. at 82 (footnote omitted).

E. Ohio Rev. Code §3599.09(A) Is Narrowly Tailored to Serve the Compelling State Interest of Disclosure.

Not only does the Disclosure Statute further a compelling state interest without significantly affecting First Amendment rights, but it is as narrowly drawn as possible. The purpose of the law is to assure that a limited amount of pertinent information is made available to the electorate. As one noted commentator has written: "The interest in providing voters with information that will permit them better to assess campaign literature ... is not so readily protected by ... means [other than disclosure]." Laurence H. Tribe, *American Constitutional Law* 1132 (2nd ed. 1988). That is because no middle ground exists between secrecy or anonymity, on the one hand, and disclosure of the sponsor's identity, on the other.

Indeed, the Disclosure Statute is more narrowly drawn to promote a compelling state interest than are campaign finance disclosure laws. Under campaign finance disclosure laws, all contributors are required to divulge their identities. This means small and large contributors are treated the same, regardless of the extent to which their contributions may influence an election. By contrast, the Disclosure Statute seeks to identify only a small fraction of the community that supports or opposes a given ballot issue. Unlike the identity of the inactive member or occasional contributor to a minor political party, whose identity must be divulged under campaign finance disclosure laws, the anonymity of the occasional campaign volunteer is unaffected by the Disclosure Statute. Consequently, under Ohio Rev. Code §3599.09(A), only some of the most active participants in the electoral process -- those persons or organizations who sponsor

mass-produced printed materials or media advertising -- must divulge their identities.[8]

Petitioner complains that the Disclosure Statute is not narrowly tailored because it does not establish a minimum amount necessary to trigger application of the disclosure requirement and exempts certain campaign materials because of their size. Brief for Petitioner at 36-37. As to the former, the Court in *Buckley* determined that campaign finance disclosure laws were not constitutionally suspect even though they established $10 as the minimum threshold. Practically speaking, there is no substantial difference between a $10 minimum and no minimum. Further, disclosure of the identity of those responsible for campaign literature has a purpose independent of contributions and expenditures: the voting public benefits from knowing the identity of sponsors of mass-produced printed materials or media advertising regardless of whether they have expended significant sums of money to promote their position.

Turning to the exemption for certain campaign materials, Petitioner is correct that the Disclosure Statute exempts from its coverage "printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer." Ohio Rev. Code §3599.09(A). This exemption, which mirrors federal law, *see* 11 C.F.R. §110.11 (excepting from federal disclosure

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[8] To ensure that the extent of such disclosure is kept to a minimum, mass-produced campaign literature sponsored by an organization must contain only the name of its chairman, treasurer, or secretary. Ohio Rev. Code §3599.09(A). In addition, the Disclosure Statute "does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution." *Id.*

requirements materials such as "bumper stickers, pins, buttons, pens and similar small items upon which the disclaimer cannot be conveniently printed"), reflects a reasonable decision not to promote form over substance. Requiring disclosures to appear on small novelty items would serve no tangible purpose because printing on such items can be difficult and any disclaimer would itself either be so small as to be illegible or so large as to obscure any other message printed on such items. Rather than posing any serious constitutional problems, this exemption simply comports with common sense.

The consistent theme of the Court's election law jurisprudence is that "[p]reserving the integrity of the electoral process ... [is an] interest[] of the highest importance." *Bellotti*, 435 U.S. at 788-89. That integrity depends on "an informed public opinion." *Barr v. Matteo*, 360 U.S. 564, 577 (1959) (Black, J., concurring). The Disclosure Statute preserves the integrity of the electoral process and contributes to informed public opinion by assuring that the electorate has access to limited attribution information that is critical in evaluating campaign literature, especially by identifying any special interests who may be financing it. Petitioner's First Amendment challenge to the validity of Ohio Rev. Code §3599.09(A) must therefore be rejected.

CONCLUSION

For the preceding reasons, the judgment of the Supreme Court of Ohio should be affirmed in this case.

Respectfully submitted,
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